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Nos. 14-46, 14-47 & 14-49

In The Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF EMISSION CONTROL COMPANIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae Emission Control Companies are businesses that research and manufacture technology for reducing mercury and other hazardous substances from power-plant emissions. They each have invested tremendous amounts of research and capital into developing effective and economically efficient means of helping their customers – power-generating companies – comply with the MATS Rule and other clean-air requirements. Precisely due to such research and investment, the methods for mercury removal have become better and less expensive than ever, and will continue to improve with experience.

Amici are interested in this case because they are direct participants in the expanding market for mercury control and can offer expertise on the issue of cost and how the market adapts to new regulations with effective innovation. They also are interested in this case because of their substantial investments in preparing themselves and their customers for the impending effective date of the MATS Rule. Such investments would be severely damaged or lost should the MATS Rule once again be delayed.

Amicus curiae ADA Carbon Solutions, LLC was originally formed in 2008 in anticipation of the need for mercury removal. From 2008 to 2010 ADA Carbon Solutions designed and built the largest, most

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

automated, and most environmentally friendly activated carbon plant focused on products that are optimized for mercury capture in North America. ADA Carbon Solutions is a market-leading supplier of activated carbon for mercury control, supplying over 30 GW of current North American power plants with their PowerPAC® and FastPAC™ activated carbons. They have a number of long-term contracts for the supply of activated carbons for mercury control. Some sites have been utilizing their products since 2009-2010 to maintain mercury compliance with state rules and consent decrees.

Amicus curiae Cabot Corporation is a leading global producer of specialty chemicals and performance materials for use in multiple industries. Cabot Norit Americas, Inc. is a subsidiary of Cabot Corporation and is a global leader in the research, development, manufacturing, and sale of high-grade activated carbons and equipment systems. Its products are used in a growing range of environmental, health, safety, and industrial applications to remove pollutants, contaminants, and other impurities from air, water, and other liquids and gases in an efficient and cost-effective manner. Cabot has been supplying its DARCO®-brand activated carbon to over 80 North American coal-fired power plants, some for over 6 years, specifically for the removal of mercury from flue gas, as contemplated by the MATS Rule. All of those plants have been meeting stringent emissions limits, including many with limits even more stringent than the MATS Rule.

Amicus curiae Calgon Carbon Corporation is a global leader in the manufacture, reactivation, and

application of activated carbon and other advanced environmental technologies. Calgon Carbon has 20 years of experience in the removal of mercury from flue gas, and has supplied Fluepac® branded activated carbon to coal-fired utilities for over 7 years. Calgon Carbon developed a first generation of advanced carbon products that typically require less than half the usage rate when compared to a standard carbon. More recently, second and third generations of advanced products have been commercialized allowing further use-rate reductions of up to an additional 40%.

Amicus curiae ICL-IP America Inc. is a manufacturer of bromine-based mercury-emission-reduction materials, among other specialty chemicals based primarily on the rich mineral resources found in the Dead Sea. Bromine-containing compounds like those supplied by ICL-IP America, added to coal, injected into the boiler, or impregnated on sorbents can be used to oxidize mercury effluent, thereby enhancing the overall removal of mercury in downstream pollution control equipment.

SUMMARY OF ARGUMENT

1. *Amici* agree with Respondents that nothing in 42 U.S.C. § 7412(n)(1)(A) requires EPA to balance cost at the initial stage of its regulatory analysis of hazardous air pollutant ("HAP") emissions rather than at the later stages of setting and analyzing specific HAP control standards. Indeed, given Congress's careful inclusion and exclusion of cost as a consideration at other stages of the rulemaking process, EPA's view is not merely permissible, it is a *bet-*

ter reading of the statute. Petitioners' position that costs can be used to block regulation of power-plant HAP emissions in its entirety – rather than merely shape the standards adopted – would allow an end run around the minimum "floor" standards in § 7412(d)(3), which Congress made mandatory regardless of direct cost considerations.

While EPA's statutory interpretation best harmonizes the structure and language of § 7412 as a whole, even a narrower focus on the language of § 7412(n)(1)(A) alone supports what EPA actually *did* in this case, notwithstanding that it may have applied different statutory labels to its analysis. If, as Petitioners suggest, § 7412(n)(1)(A) was meant as a *substantive* change of standards for power plants rather than simply a delayed trigger for § 7412's traditional two-step listing and standard-setting procedures, then the substance of § 7412(n)(1)(A) still does not support Petitioners' approach. Rather, the requirement that the Administrator find "regulation" under this section to be appropriate more naturally refers to the final standards or rules being appropriate, not the initial and non-final act of "listing" a source. If cost analysis is indeed a required part of an "appropriateness" finding, then the statute certainly permits such analysis at the *end* of the regulatory development process, as EPA functionally did, and does not require it to be a preemptive hurdle to starting that process at all.

Regardless how EPA parsed its obligations under the statute, it certainly satisfied this alternate construction of any obligation to find the MATS Rule appropriate, even with costs considered. EPA conduct-

ed a cost/benefit analysis and concluded that the regulation was highly net-beneficial. That it labeled such finding a Regulatory Impact Analysis rather than an appropriateness analysis, or reached its conclusion at the end of the regulatory process rather than at the beginning, is irrelevant even under a narrower reading of § 7412(n)(1)(A) alone.

2. Considering cost at the later standard-setting stage, rather than at a preliminary listing stage, also makes economic and regulatory sense. Cost calculations at such earlier stage would be more speculative and likely overstated. The market needs time to respond to anticipated regulations and to research and invest in potential solutions. Cost estimates before such market response would be based on underdeveloped technologies and strategies directed at unknown or uncertain emission standards. Deferring cost analysis to later in the regulatory process allows EPA to base its estimates on better-developed market data. And even then, costs likely will continue to decline as the regulations become more imminent. Indeed, that is precisely what has happened with mercury control, with the costs of mercury removal dropping rapidly as the efficiency of activated carbon and related products has increased.

3. Given the continued market adaptation to the impending rule, the limited scope of the statutory provision at issue, the narrow question presented, and the substantive findings by EPA, further review offers little prospect of benefit and considerable risk of wasted resources and harm.

First, whatever perceived economic significance of this case that may have supported a grant of certio-

rari, circumstances have largely passed that consideration by. The MATS Rule will go into effect on April 16, 2015, before this Court renders a decision in this case, and most companies have already taken any necessary steps to comply. A decision halting or further delaying implementation of the MATS Rule would render such compliance efforts wasted. Reversing course now threatens tremendous economic disruption and losses, while the economic costs of implementing the Rule have either been expended in many cases or are declining rapidly as the market continues to adapt to the impending Rule.

Second, this case is a poor vehicle for any broad precedential pronouncements that might have legal benefit given the narrowness of the question presented and the limited future applicability of § 7412(n)(1)(A). In addition, this case offers little prospect of any substantive benefit vis-à-vis the MATS Rule given that the substance of EPA's cost analysis is not part of the question presented, and will not change if EPA is instructed to conduct such analysis under a different label.

This Court should either affirm on the narrow and fact-bound particulars of this case or perhaps consider dismissing the writ as improvidently granted.

ARGUMENT

I. EPA Properly Considered Cost at the Standard-Setting Stage, Consistent with the Language of the Statute.

Amici agree with the court of appeals and Respondents that EPA properly considered cost in con-

nection with its specific proposed regulations, and was not required to speculate regarding cost when making preliminary findings whether to initiate the regulatory process in the first place. *See* National Mining Ass'n. ("NMA") Pet. App. 22a-33a; Federal Resp. Br. at 17-19, 24-28; Industry Resp. Br. at 14, 24-27; State & Local Resp. Br. at 13-14, 28-32; Amer. Acad. Pediatrics ("AAP") Resp. Br. at 14-15.

A. EPA's Interpretation of "Appropriate" Best Fits the Language and Structure of § 7412 as a Whole.

As Respondents have noted, Congress's express inclusion and exclusion of costs in the statutory provisions for setting HAP emission standards, and the absence of any reference to cost in connection with the "appropriate and necessary" language at issue here, provides ample textual support for EPA's deferred consideration of cost. *See* Federal Resp. Br. at 35-36; Industry Resp. Br. at 19-21; State & Local Resp. Br. at 20-21; AAP Resp. Br. at 24-28; *compare* 42 U.S.C. § 7412(d)(2) *and* 42 U.S.C. § 7412(d)(3) *with* 42 U.S.C. § 7412(n)(1)(A).

Indeed, to consider cost at the preliminary stage would allow an end run around the minimum floor standards methodology, § 7412(d)(3), which conspicuously supersedes and excludes the direct consideration of cost otherwise required in (d)(2). NMA Pet. App. 27a.[2] The *only* thing that importing cost consid-

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[2] Because minimum floor standards are based on control levels actually being achieved in the market, they indirectly take cost into account. NMA Pet. App. 27a; Industry Resp. Br. at 3,

erations into a preliminary "appropriate and necessary" analysis would actually impose on EPA would be an up-front cost analysis of prospective minimum floor standards, since beyond-the-floor standards carry their own cost element anyway. That would be a very peculiar result and an odd way for Congress to exempt power plants from the minimum floor requirements. Had Congress actually meant to do that, it simply could have said as much and allowed the cost-inclusive "achievable" standard to govern *all* standards applicable to power plants.

Read in context and giving meaning to all parts of the interrelated statutory language, EPA's view that cost considerations are to be deferred to the regulation-*setting* stage is not merely a permissible reading of the statutory language, it is a *better* reading of the statute. Under EPA's approach costs are still considered, but they are considered in the "appropriate" context of concrete regulatory standards and only to the extent Congress allowed.

B. Section 7412(n)(1)(A), Even Read Alone, Does Not Support a Preliminary and Preemptive Cost Analysis.

Petitioners' view of § 7412(n)(1)(A) as requiring a preliminary cost analysis stems largely from isolating the provision and its "appropriate and necessary" language from the rest of § 7412. But focusing on the language of § 7412(n)(1)(A) alone, and even assuming that the phrase "appropriate" requires a cost analysis, *still* does not support Petitioners' claim that costs

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25-26. Floor standards have a *de facto* limit of commercial viability.

must be considered at the front end of any regulatory analysis rather than at the back end in support of the final proposed and implemented regulations. Nothing in § 7412(n)(1)(A) – or elsewhere – requires that power-plant source categories or subcategories be listed and standards set in temporally discrete stages. Rather, the only two stages mentioned in that section are *reporting* and *regulating*.

The section first requires only that the "Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for *emissions which may warrant regulation* under this section." 42 U.S.C. § 7412(n)(1)(A) (emphasis added). The statute next requires that the Administrator "*shall regulate* electric utility steam generating units under this section, *if the Administrator finds such regulation is appropriate and necessary* after considering the results of the study required by this subparagraph." *Id.* (emphasis added). Nothing in the first step involves considering costs, and nothing in the second step requires listing power-plant source categories *prior* to proposing regulations for any emissions.

EPA, of course, reads this provision against the backdrop of the rest of § 7412 and quite permissibly incorporates the two-step process – and the separation of health and cost considerations – reflected in § 7412 as applied to other source categories. But viewed as Petitioners would have it – as creating a different procedure and requirement for power-plant regulation – there is no reason to read the language as setting a condition for the *initial* listing when, in setting a required finding for the command "shall

regulate," it more naturally describes the full and final outcome of the regulatory process, not merely the gateway stage. It is then "such regulation," *i.e.*, the proposed and eventually adopted rules, that EPA would need to find "appropriate and necessary." To the extent § 7412(n)(1)(A) provides an alternative gateway to regulation than the previous listing process for other sources, the "appropriate and necessary" finding need not temporally *precede* proposed regulations. Rather, it is merely one of many requirements for such eventual regulations.

Under this alternative approach, the entire "appropriate and necessary" finding would be made concurrent with the final rule, as EPA eventually did when reaffirming its earlier finding in light of the updated record. *Final Rule*, 77 FED. REG. 9304, 9310-11 (Feb. 16, 2012); NMA Pet. App. 14a.[3] And this construction would provide better guidance regarding what was indeed "appropriate" based on the various rules for setting standards as well as Executive requirements for cost-benefit analysis.

By focusing on the purported mandatory *content* of the word "appropriate," Petitioners overlook what the text of § 7412(n)(1)(A) suggests regarding *timing*. EPA's actual conduct in this case is fully consistent with this alternative reading calling for a preliminary

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[3] Under this approach, EPA's 2000 finding was unnecessary, as was any initial decision to "list" power plants before proposing regulations. EPA could have identified its proposed source category concurrent with its proposed regulations and deemed the entire result appropriate and necessary in the final rule. EPA eventually did just that, and the court of appeals recognized that it made any objections to earlier procedures moot. NMA Pet. App. 17a.

report about HAP emissions that "may warrant regulation" – *i.e.*, pose a potential health threat – followed by an "appropriate and necessary" finding at the time such actual regulations are approved. And while EPA housed its cost consideration under the rubrics of both its § 7412(d) standard setting and its Regulatory Impact Analysis, rather than its "appropriateness" finding, the *substance* of what it did fully complies with what Petitioners read into the word "appropriate" even if the labels it used to describe why it did such analysis were different. Having eventually combined its "appropriateness" finding and its cost analyses into its final regulatory decision, EPA fully satisfied any supposed cost-consideration obligation under § 7412(n)(1)(A), notwithstanding that it gave separate names to those analyses.

Even assuming a requirement to consider costs, there is no call for a further remand to have EPA do under a different regulatory label what it has already done.

II. Regulation-Specific Consideration of Costs Is the Only Economically Sensible Means of Applying the Statute.

EPA's approach to costs not only is a better reading of the statute as a whole (and fully consistent with a narrower alternative reading of § 7412(n)(1)(A) alone), it also is more sensible from an economic and regulatory perspective. Attempting to estimate costs prior to doing the floor-standards analysis of what is actually being achieved in the market simply invites speculation and is not conducive to reasoned decision-making.

A. The Future Cost of Market-Driven Solutions Cannot Reliably Be Measured at an Early or Abstract Stage.

While Petitioners would have EPA consider the costs of hypothetical regulations at the beginning of the regulatory process, EPA's decision to address costs at a later stage in connection with actual proposed rules makes far more economic sense. *See* Industry Resp. Br. at 24-27. From a purely practical perspective, cost information is highly variable and depends to a great degree on the targets being set and the technologies and methods that will be used.

Some cost information regarding existing technologies and methods will, of course, exist even at the outset of the regulatory process. But such information is necessarily speculative if there is little or no guidance regarding what level of emissions reduction must be achieved. Certainly a market just beginning to consider how to achieve reductions in particular pollutants will not have had time to innovate, become more efficient, or plan strategies to meet multiple clean-air goals. And even where similar goals are being met and technology deployed on a small scale, the market needs time to assess the feasibility, costs, or economies of scale of ramping up to meet a nationwide requirement for greater emission controls.

By contrast, once EPA has signaled, by listing or otherwise, its intent to regulate a particular source and particular pollutants, existing participants and new entrants into the market have strong incentives to research new and improved control strategies and to develop more accurate plans and cost estimates in order to attract investment. It is the very fact of

EPA's intent to regulate that generates the market demand for such technologies and subsequently allows EPA to obtain more accurate information regarding cost and effectiveness.

Mercury control provides a useful example of this market response. At the outset of the regulatory process, scrubbers previously installed at some plants to comply with SO_2 and particulate matter requirements also provided a degree of mercury control and thus some baseline cost data. But § 7412(n)(1)(A) applies precisely where such incidental HAP control is insufficient and further controls are needed; just as EPA determined was the case with mercury emissions. While mercury control technology such as activated carbon injection existed when EPA conducted its utility study, it existed on a much smaller scale. The cost and availability of such technology in volume for full-scale use would have been uncertain, and a premature cost analysis, as sought by Petitioners, would have been based on older data and not have had the benefit of market innovation and development. EPA's initial listing of coal- and oil-fired power plants, however, created a prospective demand for less expensive and more efficient mercury control and the market responded.

Amici Emission Control Companies were part of that response. They produce activated carbon or bromine-based additives that help control mercury emissions and they have invested considerable scientific and financial resources in improving those products.

One such mercury control method involves injecting brominated powdered activated carbon directly

into the ductwork of a coal-fired power plant after the point of combustion but before an existing particulate collection device such as an electrostatic precipitator or a fabric filter baghouse. The bromine oxidizes any elemental mercury in the combustion emissions stream, the activated carbon efficiently captures the oxidized mercury, and then the mercury-imbedded activated carbon is removed from the system (along with other particulate matter) by the existing particulate collection device. Cost and feasibility data for this type of approach was far better developed at the time of the final rulemaking than it was in 2000 when the initial "appropriate and necessary" determination was made. *Final Rule*, 77 FED. REG. at 9425-26. Indeed, any attempt to estimate the costs of such an innovative approach at that earlier time would have involved considerable speculation. After the market had an opportunity to respond, however, credible cost estimates became much more reasonable and feasible.[4]

The point is that any cost analysis done at the preliminary stage sought by Petitioners will inevitably be inaccurate and almost certainly overstated. Such estimates would take the field as it exists – underdeveloped and with little incentive for investment or innovation – rather than how it will be at the time the regulation goes into effect. The EPA's approach

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[4] While this *amicus* brief contemplates the use of activated carbon and/or bromine to capture mercury emissions, other technologies continue to be developed as a result of the MATS Rule. Those technologies include non-carbon-based sorbents, advanced particulate control systems, and other multi-pollutant control platforms.

at least gives the market a head start so it can innovate and provide improved strategies and reasonable cost estimates for subsequent specific proposals for HAP reduction.

B. Compliance Costs Rapidly Decline Once the Market Responds with Innovative Solutions to Anticipated Regulation.

No matter when a cost estimate is made, however, the market for emission control products will continue to innovate and develop, rendering any cost estimates quickly outdated. In short, any gloom-and-doom cost scenarios suggested by Petitioners, NMA Pet. Br. at 1, 14-15, 18-19, will quickly be overrun by events. Such a market response to anticipated regulations is not merely conjecture – it is precisely what has happened in connection with the MATS Rule.

Although EPA estimated $9.6 billion in annual compliance costs, 77 FED. REG. at 9424, technology and innovation are demonstrating that the costs of complying with the MATS Rule are in fact much lower. For example, many power plants are already compliant with the MATS Rule and will not have to spend any additional money for mercury removal. Such plants either use fuels with lower mercury emissions, already employ control strategies for other pollutants that also reduce mercury emissions, or must already comply with mercury emissions standards adopted in 14 States, Industry Resp. Br. at 9. Based on *amici*'s own market research, we project that of the 271 Gigawatts (GW) of coal-fired power generation capacity expected to be in service as of

2017 and subject to the MATS Rule ("covered capacity"), 36% will bear no direct costs for mercury compliance given their existing infrastructure or fuel source. An additional 66 GW (24%) of covered capacity has already installed such controls pursuant to state regulations or consent decrees independent of the MATS Rule.

Of the remaining 108 GW (40%) of covered capacity that will need to install mercury controls specifically as a result of the MATS rule, 90 GW of covered capacity has already installed or is in the final stages of installing mercury controls and the remaining 18 GW (7% of covered capacity or 17% of capacity needing to add controls specifically for the MATS Rule) will install such controls in 2015.

For plants using activated carbon control methods, their costs involve initial construction of an injection silo and installing injection equipment, and then annually purchasing activated carbon. For the vast majority of covered capacity, the up-front costs of installing the needed equipment have already been or will be expended and will not change regardless how this case turns out.

As for the annual costs for activated carbon control methods, developments in the market have dramatically reduced those expenses. While the annual market for activated carbon initially was projected to reach 800 million to 1.2 billion lbs., improvements in the efficiency of activated carbon and procedures for injecting it have significantly reduced projected annual consumption to less than half the previous pro-

jections – down to 350 million to 500 million lbs.[5] Not only has the quantity of activated carbon required for effective mercury control declined, the price per lb. also has declined by about 30% since 2010. As a result of such efficiencies, the projected annual cost of this approach to mercury control has likewise declined. In short, whatever estimates were used to determine costs even as late as 2010, those estimates likely overstate the current reality as the market continues to respond and innovate.

Similarly, while EPA estimated that the MATS Rule would cause a 3.1% increase in energy prices, empirical results suggest that such estimate may have been overly pessimistic. For example, in a utility rate filing seeking to recover the costs of MATS compliance in South Dakota, *Petition of Otter Tail Power Company*, Aug. 1, 2014 (available at http://puc.sd.gov/commission/dockets/electric/2014/EL14-070/petition.pdf), the Otter Tail Power Company disclosed that three of its coal-fired power stations will make use of powdered activated carbon (of the type sold by one of the *amici*) to comply with the mer-

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[5] In Illinois, for example, state requirements announced in 2006 required the use of activated carbon to significantly reduce mercury emissions by 2009. *See Illinois EPA Mercury and Clean Air Interstate Rule (CAIR) Rulemaking* (http://www.epa.illinois.gov/topics/forms/air-permits/mercury-rules/index). The experience of some of *amici*'s customers under the Illinois rule shows that compliance with rules even stricter than the MATS standard can be achieved with far less activated carbon than originally projected and in some case with as little as 20% of what was initially required. Similarly, some of *amici*'s Canadian customers of activated carbon have seen as much as 50% or greater reductions in their activated carbon usage as they have migrated to 2nd and 3rd generation products.

cury portion of the MATS Rule. *Id.* at 9. The company anticipates that the South Dakota share of its annual compliance costs will be approximately $314,000 spread over annual consumption of 424,651,653 kWhs of power. *Id.* at 9-10, 13.

Based on those figures, the price per kWh for an average residential customer in South Dakota would increase by $0.00074, or less than 1% of the average 2013 residential price in South Dakota of $0.1026 per kWh. *See Electric Sales, Revenue, and Average Price*, Table 5a (http://www.eia.gov/electricity/sales-revenue price/pdf/table5 a.pdf). Given the average residential consumption in South Dakota in 2013 of 1055 kWhs per month, this represents a mere $0.78 per month increase in the price of electricity. *Id.* Similarly at the national level, the average residential monthly customer uses 909 kWh per month and pays $0.1212 per kWh for an average monthly cost of power of $110.20. *Id.* While costs can obviously vary depending on plant configuration, fuel type, and other factors, assuming, *arguendo*, a similar average activated carbon usage rate, an average residential customer would see an increase in his or her monthly bill of only 0.6% ($0.67). While secondary effects of the MATS Rule also factor into the Rule's impact on electricity prices, the direct costs of MATS compliance on electricity bills will be minimal.

In short, whatever compliance costs and other impacts were estimated for the MATS Rule in 2011 and 2012, those costs and impacts have continued to decline. That result both supports having EPA wait as long as possible before analyzing the costs of pro-

posed regulations and also undermines Petitioners' claims regarding the impact of the MATS Rule.

III. The Market's Response to the Impending MATS Rule and EPA's 2012 Regulatory Findings Make the Narrow Question Presented of Little Prospective Value and of Considerable Present Economic Risk.

When this Court granted certiorari on the narrow question presented, it presumably did so because of the perceived economic importance of this case and some concern for the broader role of costs in regulatory analysis. As the briefing and evolving events reveal, however, the MATS Rule does not pose the economic threat suggested by Petitioners. Remanding, vacating, or otherwise delaying the Rule now poses its own significant economic consequences and the legal or practical value of resolving the question presented is limited at best and may not warrant this Court's extended attention.

First, because the MATS Rule goes into effect on April 16, 2015, well before any expected decision in this case, the market has already begun – and has in fact nearly completed – preparing to comply with the Rule. *See supra* at 15-16. Of the 174 GW of covered capacity that needs some sort of mercury control, 66 GW of capacity already has mercury controls because it is covered by state regulations or consent decrees. An additional 90 GW of covered capacity has already installed or is in the final stages of installing mercury controls to comply with the MATS Rule. Only 18 GW of covered capacity thus lacks installed equipment and that capacity will install such equipment in 2015.

In short, 93% of the 271 GW of total covered capacity either requires no additional mercury controls or has already installed the technology required.

The market having already adapted to the impending Rule, any action by this Court unwinding or delaying the MATS Rule would cause substantial losses to those power companies and others who have invested in compliance. Industry has already spent billions on updated pollution controls, Industry Resp. Br. at 10, and many of those sunk costs will be wasted in the absence of the MATS Rule.

Additionally, various supporting industries have made huge investments to develop and manufacture the technology and products that will enable covered power plants to comply with the Rule. *Amici*, for example, collectively have spent over $750 million on activated carbon production capability. In fact, production capacity for activated carbon was accelerated in response to earlier attempts at a mercury rule and has been sitting idle as the Rule waxed and waned over the years. Those investments would be further damaged or lost should the Rule again be delayed for years.[6]

Insofar as this case was taken for its perceived economic importance, therefore, events have outpaced such claims by Petitioners. The vast majority of up-front costs imposed by the Rule have already been expended and future costs are declining rapidly. *See supra* at 15-18. The economic costs of delaying or va-

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[6] Similarly, smaller companies developing other innovative technologies not yet widely adopted likely will go out of business, and investments in them will be lost, if the MATS Rule is further delayed.

cating the Rule, however, have continuously grown. It is now difficult to predict the mixed economic consequences of a decision in either direction and hence that factor should play little or no role in this Court's decision whether this case remains worthy of its attention or how it should be resolved.

Second, given the narrow question presented, there is little prospect this case will set meaningful precedent or resolve any pressing legal issues. In many ways this case is a one-off situation involving a limited legal issue and unusual and fact-bound procedural history and findings.

The question presented in this case is limited to whether EPA "unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities." If that question implies that EPA *never* considered the cost of the MATS Rule before regulating, the answer is obvious: EPA *did* consider costs in setting emission standards and in the Regulatory Impact Analysis, and found the Rule to be cost-beneficial.

If the question instead asks whether EPA's cost analysis should have occurred earlier or had a different *label* – *i.e.*, should have been part of its "appropriateness" analysis – it adds little practical or legal value. Due to the convoluted procedural history of these regulations and the long delay between the initial "appropriate and necessary" finding in 2000 and the renewed finding in 2012, the question whether EPA should have considered costs at the early or later stages of the process or under a different analytic label is now largely besides the point.

In 2011 and 2012, EPA considered costs in the Regulatory Impact Analysis and found they were outweighed by the anticipated benefits of the MATS Rule. That substantive finding is not at issue here given the limited question on which this Court granted certiorari. EPA simultaneously reaffirmed its 2000 finding that regulation was appropriate and necessary and made a new finding " 'confirm[ing] that it remains appropriate and necessary today to regulate' " certain power plants. Pet. App. 14a (quoting EPA; citation omitted). But for not having discussed costs, the substance of *that* finding is likewise no longer at issue in this Court.

Given such simultaneous findings that regulation remained appropriate and necessary and that the benefits outweighed costs, arguing over which statutory or regulatory language required such findings, or when in the regulatory process they should have been made, is splitting hairs and an academic formality of doubtful value to either the country or this Court.[7]

The timing issue – whether costs should have been considered pre-listing – is particularly pointless given that any listing decision is not even reviewable until after the final regulations are issued, 42 U.S.C. § 7412(e)(4), and hence review of the cost analysis will necessarily occur at the same time as review of the substantive regulations and the final Regulatory Impact Analysis. And, as Respondents have noted, nothing meaningful would change if EPA is required to rename its cost/benefit analysis an "appropriate-

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[7] Had EPA concluded that the costs outweighed the benefits and proceeded anyway, then the question presented might have some practical relevance.

ness" finding. Federal Resp. Br. at 20, 55; Industry Resp. Br. at 39-41; State & Local Resp. Br. at 43.

As further briefing and the passage of time now reflect, events effectively have passed by the continued relevance of the question presented. Trying to unwind or restart the process now would impose its own tremendous costs and will not change the eventual outcome.

Because nothing in the statute plainly commands the reading offered by Petitioners, EPA has the linguistically better and more practical interpretation regarding the role of costs in the process, and EPA has already found that benefits outweigh the costs of the regulations in this case, there is very little to recommend upsetting the apple cart now. In fact, constantly starting and stopping the mercury rules may impose such high transaction costs and losses that even an economically imperfect rule to which the market could adapt would be better than the shifting winds and uncertainties that would result from a further remand.

Whether such considerations favor succinctly affirming the decision below on narrow grounds or, perhaps, dismissing the writ as improvidently granted, the alternative sought by Petitioners makes the least sense of all and would impose serious costs on the economy with little offsetting benefit. Indeed, it would penalize those who responsibly sought to comply with the impending Rule and might be unable to recover their expenses for doing so, and would reward those who dragged their heels at the expense of public health. Such considerations should at least inform this Court's continuing discretion as to whether this

case is a valuable and productive use of its limited resources and certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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